Supreme Court, U.S.
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No. 01-1426

IN THE

Supreme Court of the United States

SHANK/BALFOUR BEATTY,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 12,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent International Union of Operating Engineers, Local Union No. 12 is not a corporation or a publicly held company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent International Union of Operating Engineers, Local Union No. 12 respectfully requests the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

The petition before this Court fails to advance any compelling reason for granting certiorari. The Ninth Circuit did not create a circuit split when it deferred to the arbitrator's interpretation of ambiguous provisions in the parties' collective bargaining agreement, after concluding that the arbitrator's opinion offers a plausible interpretation of the two contracts at issue. Instead, the Ninth Circuit's rejection of petitioner's attempt to open a back door to judicial review of the merits of the arbitrator's award was grounded in the well-

established and long standing precedents of this Court, emphasizing the broadest possible judicial deference to arbitration awards in order to effectuate the federal labor policy of settling disputes by arbitration.

A. The Collective Bargaining Agreement

Petitioner is one of many contractors performing work on the Inland Feeder Project, a major water distribution pipeline being developed for the Metropolitan Water District of Southern California. The Inland Feeder Project is a multi-year, 1.1 billion-dollar undertaking of the MWD, with the stated goal of conveying added capacity of the east branch of the State Water Project into the metropolitan service area, thereby providing the more than 15 million residents of Southern California with up to 650 million gallons of additional water per day. When completed, the Inland Feeder Project will also replenish local groundwater supplies, improve the quality of Southern California's drinking water, and provide an important source of water for several reservoirs. (Pet. App. at 30a).

Parsons Constructors, Inc. ("Parsons") is the Project Contractor. In 1996, Parsons entered into a Project Labor Agreement with the Building and Construction Trades Department, AFL-CIO ("BCTD") with respect to work performed on the development of a water distribution pipeline that begins in the Devil Canyon area north of San Bernardino and ties into the Colorado River Aqueduct south of Lake Perris, near San Jacinto, eventually terminating at the junction of Casa Loma and San Diego Canals, connecting them to the Eastside Pipeline (hereinafter referred to as "The Project"). (Pet. App. at 28a). It is the policy of the Metropolitan Water District that the construction work covered by the Project Labor Agreement ("PLA") shall be contracted exclusively to Contractors who agree to execute and be bound by its terms

(Pet. App. at 28a). In February 1997, petitioner signed a Letter of Assent agreeing to be bound to the terms and conditions of the PLA. (Pet. App. at 22a).

Fourteen international unions as well as a number of their affiliated locals, including respondent, are signatory to the PLA. Recognizing that each union has master labor agreements with various employer associations governing the unique terms and conditions of employment of their respective crafts, the PLA incorporates by reference certain provisions of these individual collective bargaining agreements, collectively referring to them as "Schedule A." The Master Labor Agreement between Local 12 and the Southern California Contractors Association, Inc. ("MLA") is the individual collective bargaining agreement, or Schedule A, relevant to the dispute that was the subject of arbitration. (Pet. App. at 23a and 47a).

In addition to incorporating the MLA, the PLA also contains an express agreement between Local 12 and Parsons regarding the manning levels of equipment in Local 12's jurisdiction. The agreement, contained in a letter from Parsons to Local 12 dated October 1, 1996, is appended to and made a part of the PLA, and confirms that the equipment manning requirements of the MLA are not superceded by the PLA.[1] Petitioner does not deny it is bound to this express provision of the PLA. Rather, petitioner ignores its very existence.

Petitioner correctly notes that Parsons and BCTD anticipated potential disagreements over whether and to what extent to apply provisions of the various local union collective bargaining agreements to work covered by the PLA, and agreed that such disputes shall be referred to Arbitrator Howard S. Block for resolution under the grievance and

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[1] The Letter of Understanding is appended hereto at 1a.

arbitration procedure of the PLA. (Pet. App. at 36a). The award petitioners seek to overturn was rendered pursuant to this procedure.

B. The Labor Dispute and the Arbitration Award.

In 1998, a dispute arose between petitioner and Local 12 over the application and interpretation of the PLA regarding the number and classification of employees required to be employed to perform certain work on the Project (referred to by the parties as "manning provisions"). (Pet. App. at 23a and 26a). Specifically, Local 12 charged petitioner with violating Article XVI Section M of Schedule A of the MLA, which is incorporated by reference in the PLA, by failing to assign an Engineer Oiler to work on its cranes. When they were unable to resolve the dispute over manning provisions, the grievance proceeded to arbitration before Arbitrator Block. (Pet. App. at 24a).

On August 10, 1999, Arbitrator Block issued his Opinion and Award ("Award"), in which he held that petitioner had violated the agreement by not having Oilers for both cranes, finding that the specific language of the MLA mandating that cranes be manned "at all times" by a crew consisting of an Engineer-Oiler and an Engineer-Oiler or Fireman governed the manning of the cranes in question. Arbitrator Block considered and rejected petitioner's contention that the general management's rights clause in Article V, Section 1 of the PLA, together with the third paragraph of the October 1, 1996 Letter of Understanding between respondent and Parsons permitted petitioner to ignore the contractual manning provisions of the MLA. (Pet. App. at 49a-59a).

As a remedy for the contract violation, Arbitrator Block ordered petitioner to comply with all contractual manning requirements in the future including, but not limited to, the hiring of Oilers for both its Lorraine and Manitowac Cranes.

He denied without prejudice the Union's request for a "make whole" remedy of lost wages to Engineer-Oilers who should have been assigned to the cranes.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Article II, Section 4(a) of the PLA requires the arbitrator to defer to the PLA when the grievance concerns a subject covered by conflicting provisions of the PLA and the MLA. Petitioner argues that the arbitrator, the district court and the Ninth Circuit all conceded that the PLA and MLA address the manning requirements for the cranes operated by petitioner, and therefore, the plain language of Article II, which petitioner refers to as "the supersession clause," deprived the arbitrator of the jurisdiction to apply the terms of the MLA to the dispute. (Pet. at 12.) The Ninth Circuit was required to vacate Arbitrator Block's award, concludes petitioner, because he dispensed his own brand of industrial justice by giving consideration to the terms of the MLA.

This assessment of the record below is so oversimplified as to be misleading. In fact, the district court recognized that Arbitrator Block's opinion was based on his conclusion that the MLA's manning requirements were incorporated into and made a part of the PLA by virtue of the Letter of Understanding between Parsons and Local 12:

> ". . . Block appears to agree with Local 12 that the letter of understanding incorporated the MLA into the PLA, *forming one contract.* Because Block could have easily determined that the MLA was incorporated into the PLA through the letter of understanding, Block's determination is a reasonable interpretation of the two collective bargaining agreements." (Emphasis supplied.)

Relying chiefly on this Court's opinion in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960), the district court concluded that Block followed the essence of the PLA, and therefore did not dispense his own brand of industrial justice. (Pet. App. at 13a.)

The Ninth Circuit agreed, dismissing petitioner's argument that the language of the PLA is so plain and unambiguous that the arbitrator was required to give the management's rights clause superceding effect. Indeed, the Ninth Circuit recognized that petitioner was attempting to "open a back door to judicial review of the merits of an arbitration award," the very thing this Court cautioned against in *Enterprise Wheel*. (Pet. App. at 2a.)

Petitioner's insistence on completely ignoring the Letter of Understanding, and its significance both to Arbitrator Block's award as well as to the decision below, permits it to engage in a facile analysis of all other authorities. Thus, petitioner pedantically recites this Court's observation in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), that an arbitrator cannot ignore the plain language of the contract, and suggests that this is precisely what Arbitrator Block did in refusing to defer to the PLA's management's rights clause. In truth, Arbitrator Block considered and interpreted the plain language of the *entire* agreement, *including* the Letter of Understanding between Parsons and Local 12, and this is the true cause of petitioner's dissatisfaction with the award.

Recently, in *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000), this Court reiterated "if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Id.* at 62 (quoting *Misco*, *supra*, at 38). "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not

provide a basis for a reviewing court to refuse to enforce the award." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001), (quoting *Misco, supra,* at 39).

Contrary to petitioner's assertion, the decision below did not depart from these authorities. Instead, referring to its decision in *Hawaii Teamsters & Allied Workers Union v. United Parcel Service*, 241 F.3d 1177 (9th Cir. 2001), the Ninth Circuit emphasized: "As bears repeating, 'so far as the arbitrator's decision *concerns* construction of the contract'—as it does here—'the courts have no business overruling him because their interpretation of the contract is different from his.'" *Id.* at 1183 (quoting *Enterprise Wheel, supra*, at 599). Significantly, the *Hawaii Teamsters* case was one in which the union suggested the same narrow approach to contract interpretation as advanced in the petition. Looking beyond the union's formulaic attack on the arbitrator's award, the Ninth Circuit took great care to insure that the mere recitation of the familiar phrases, "draws its essence from the collective bargaining agreement" and "dispensed his own brand of industrial justice," did not open a back door to judicial review of the merits of an award:

> Local 996's position would result in the exception swallowing the rule; any time an arbitrator arrived at a result that a party believes to be the result of faulty contract interpretation, it could obtain judicial review of the merits by phrasing its disagreement with the arbitrator's award as a complaint that he disregarded the contract and 'dispensed his own brand of industrial justice.' But the fact that an arbitrator arguably misinterpreted a contract does not mean he did not engage in the act of interpreting it.

Id. at 1183.

The Ninth Circuit characterized the union's position in *Hawaii Teamsters* as a "straightjacket approach to contract interpretation." *Id.* at 1182. This is the same approach

adopted by petitioner to persuade the Court that the petition presents an opportunity to provide significant guidance on what standards federal courts should use in assessing whether an arbitrator has dispensed his own brand of industrial justice. (Pet. at 14.) In truth, petitioner invites a merits-based review of the arbitration award, something this Court has consistently declined to do for over forty years. However, even if the record offered more convincing evidence that Arbitrator Block completely misinterpreted the Letter of Understanding—and it most certainly does not—such an error would not warrant the drastic departure from this Court's established precedent: "Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors *or misinterprets the parties' agreement*." *Garvey*, 532 U.S. at 509.

II. THE NINTH CIRCUIT DECISION DOES NOT CREATE A CIRCUIT SPLIT

Again, petitioner's complete disregard of the Letter of Understanding poisons its analysis of decisions in the First, Fourth and Sixth Circuits, and leads it to the erroneous conclusion that the decision below establishes a circuit split. It does not.

First, the so-called "supersession clause" of the PLA does not, as petitioner argues, render the PLA's provisions unambiguous. Significantly, the "supersession clause" could not determine the meaning of the Letter of Understanding, and petitioner has never argued otherwise. This question of what effect the Letter of Understanding was to be given was specifically before the arbitrator, with the parties advancing their different interpretations of that agreement. (Pet. App. at 53a–56a.) As the district court noted, Arbitrator Block "appear[ed] to agree with Local 12 that the letter of understanding incorporated the MLA into the PLA, forming one contract." (Pet. App. at 13a.) The "supersession clause"

becomes irrelevant with this finding, because in effect, the PLA itself contains the manning requirements, which Arbitrator Block concluded had been violated by the petitioner.

Second, the cases cited by petitioner are distinguishable, and thus not in direct conflict with the Ninth Circuit. In *Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Bd.*, 724 F.2d 1217 (6th Cir. 1984), an employee was discharged for insubordination, after repeatedly refusing to comply with his supervisor's instruction to perform detailed inventories on a regular basis. In addition to a broad, general management's rights clause, the collective bargaining agreement contained a provision specifically empowering the employer to discharge employees "without redress" for insubordination. The arbitrator found that the employee had in fact been insubordinate. Despite the specific language of the collective bargaining agreement, however, he modified the discipline imposed by the employer. The Sixth Circuit vacated the award, because the agreement unambiguously allocated the power to discharge for insubordination solely to the Company. *Morgan Services, supra*, 724 F.2d at 1222.

Arbitrator Block's conclusion that the MLA's manning provisions were incorporated into the PLA by virtue of the Letter of Understanding, gave him the authority to determine whether the management's rights clause or the incorporated manning requirements controlled the outcome of the grievance. To the extent these provisions were ambiguous, his application of traditional principles of contract interpretation, preferring the specific over the general, were correctly utilized. Again, both provisions were, in effect, a part of the PLA, and therefore the "supersession clause" had no relevance. Arbitrator Block did not fashion a remedy where the parties agreed none existed. He interpreted ambiguous provisions in a collective bargaining agreement, in a manner that gave meaning to the parties' stated intent.

Similarly, in *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523 (4th Cir. 2000), the arbitrator fashioned a remedy where none existed when he ordered a hearing on the merits of a grievance protesting the termination of a probationary employee, where the collective bargaining agreement expressly stated that employees terminated during their probationary period "shall not be permitted access to the grievance and arbitration procedure. . . ." *Id.* at 525. The Fourth Circuit vacated the award, concluding that arbitration is a matter of contract, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 528 (quoting *United Steelworkers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

The distinction between Arbitrator Block's award and the award of the arbitrator in *United States Postal Serv.* is self-evident. It is only by disregarding the existence of the Letter of Understanding that petitioner can even venture the suggestion that Arbitrator Block asserted authority over a non-arbitrable dispute. Nothing in the record or decision below supports the contention that the Ninth Circuit's decision conflicts with the Fourth Circuit's in any meaningful way.

Finally, in *Georgia-Pacific Corp. v. Local 27, United Paperworkers International Union*, 864 F.2d 940 (1st Cir. 1988), the arbitrator found that the grievant had engaged in an act of dishonesty, and further, that the collective bargaining agreement was unambiguous on its face, permitting the employer to discharge immediately for dishonesty. Despite these two findings, the arbitrator reinstated the grievant, reasoning that while he lacked the authority to mitigate the discharge penalty because of the circumstances of the offense, he nonetheless possessed "normal authority" to mitigate on the basis of the grievant's overall employment record.

The First Circuit vacated the award, calling the arbitrator's reasoning "reminiscent of an *Alice in Wonderland* fantasy." *Georgia Pacific Corp., supra*, 864 F.2d at 945.

Arbitrator Block's findings, far from evoking images of Alice's fantastic adventures, are consistent with his award, and are a plausible interpretation of the agreements. Petitioner's dispute, however, is with the very fact that Arbitrator Block interpreted the agreements. With respect to an arbitrator's discretion to interpret ambiguous provisions in a collective bargaining agreement, however, the First Circuit noted:

> We do not mean to suggest that an arbitrator enjoys no discretion in interpreting the terms of a collective bargaining agreement. Although the collective bargaining agreement in this case authorizes immediate discharge for dishonesty, it does not define that term. It is thus up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty.

Id. at 945, fn. 2.

The perceived circuit split dissolves with the recognition that Arbitrator Block's undisputed authority included giving meaning and effect to the Letter of Understanding. His authority was not as limited as petitioner disingenuously suggests. Petitioner bargained for—and received—the arbitrator's construction of the entire PLA, including the Letter of Understanding. The cases presented to the First, Fourth and Sixth Circuits contained entirely dissimilar facts.

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

PARSONS CONSTRUCTORS INC.
100 West Walnut Street
Pasadena, California 91124
(818) 440-3000 • (818) 440-2516

October 1, 1996

Mr. William Waggoner
Business Manager
Operating Engineers Local 12
150 East Corson Street
Pasadena, California 91103

Dear Mr. Waggoner:

SUBJECT: MWD Inland Feeder Project Labor Agreement

This letter will confirm our understanding concerning the interpretation and application of Article III, Section 2, and Article V, Section 1, of the MWD Inland Feeder Project Labor Agreement as those sections might affect the equipment manning provisions of the Operating Engineers local collective bargaining agreement. In the negotiations, the parties agreed in Article III, Section 2, that the Contractor has the right to determine the number of employees it will hire. You have requested that we clarify, in light of this provision, the effect of the Project Agreement supercession clause, Article II, Section 4, upon the various manning requirements contained in the Operating Engineers local agreement.

As a result of our discussions with you, we have confirmed our mutual interpretation that the equipment manning requirements of the OE local agreement are not superseded and therefore they would apply to set the manning levels for the equipment falling within the jurisdiction of the Operating Engineers, consistent with other provisions of the Project Labor Agreement. Article III, Section 2, does not purport to regulate the classifications the Contractor employs on particular equipment; it addresses only the number required.

Accordingly, the classifications and the functions they perform as set out in the Schedule A are unaffected by this Section.

The Parties also agree in the Project Labor Agreement that, "No rules, customs, or practices which limit or restrict productivity, efficiency, or the individual and/or joint working efforts of employees shall be permitted or observed." Article V, Section I. This provision, coupled with the right to determine the number of employees hired, is vital to the Contractor's right and responsibility to direct the performance of the work, and does not require more workers than are necessary to perform the work.

The parties agree that they will keep an open channel of communication to insure that all parties to this agreement are fully informed of facts affecting the substance of this letter.

If you agree that this letter accurately sets forth the substance of our understanding and provides the basis for resolving any questions concerning the interpretation and application of Article III, Section 2, and Article V, Section 1, of the Project Labor Agreement, please indicate your acceptance in the space provided below.

Very truly yours,

/s/ Michael W. D'Antuono
MICHAEL W. D'ANTUONO
President

MWD:BWC:sm

Agreed and Accepted this 1st day of October, 1996.

International Union of Operating Engineers, Local 12.

By: /s/ William Waggoner
WILLIAM WAGGONER
Business Manager